

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PHILLIP L. STUART, JR.
Claimant

VS.

WESTLAND CONSTRUCTION, INC.
Respondent

AND

CONTINENTAL WESTERN INSURANCE COMPANY)
Insurance Carrier)

Docket No. 1,030,254

ORDER

Claimant appealed the March 13, 2009, Award entered by Administrative Law Judge Marcia L. Yates Roberts. The Workers Compensation Board heard oral argument on July 8, 2009.

APPEARANCES

Michael W. Downing of Kansas City, Missouri, appeared for claimant. Nathan D. Burghart of Lawrence, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, a November 7, 1999, medical report from Dr. J. Michael Smith was entered into evidence at the deposition of Dr. James S. Zarr. At oral argument before the Board, the parties stipulated that claimant is the individual who is the subject of that report.

ISSUES

This is a claim for a June 20, 2006, accident and resulting injury. In the March 13, 2009, Award, Judge Yates Roberts determined claimant sustained a 17 percent functional impairment to the left lower leg and that claimant was entitled to receive temporary total disability benefits for the period from July 21 to August 16, 2006.

Claimant contends Judge Yates Roberts erred as he should receive permanent total disability benefits. Claimant first maintains the left leg injury he sustained in the June 2006 accident created an altered gait, which, in turn, caused pain in his low back. Next, claimant argues the restrictions against bending, stretching, and lifting, which were recommended by Dr. Mark B. Chaplick due to the dorsal column stimulator implanted in claimant's lumbar spine, support a whole person disability under K.S.A. 44-510e. And finally, claimant asserts the complex regional pain syndrome (CRPS) or reflex sympathetic dystrophy (RSD) in his left leg affects his entire body and, therefore, should be treated as an injury to the whole person. Accordingly, claimant requests the Board to modify the March 13, 2009, Award and either grant him permanent total disability benefits or permanent partial disability benefits under K.S.A. 44-510e.

Respondent also requests the Board to modify the Award. Respondent requests the Board to affirm that claimant sustained an injury to the left lower leg and uphold the denial of permanent total disability benefits (K.S.A. 44-510c) and work disability¹ benefits (K.S.A. 44-510e). Respondent contends the situs of claimant's injury is his leg and, therefore, K.S.A. 44-510d precludes him from receiving permanent total disability benefits, regardless of his ability to work. In the alternative, should the Board determine claimant's injuries are not included in the schedule of K.S.A. 44-510d, respondent maintains claimant retains the ability to perform substantial and gainful employment and that claimant has failed to make a good faith effort to find other employment.

Finally, respondent requests the Board to reverse the award of temporary total disability benefits for the period from July 21 to August 16, 2006, as claimant was fired for missing work and not under any restrictions that prevented him from working during that period of time.

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?
2. Is claimant entitled to receive temporary total disability benefits for the period from July 21 to August 16, 2006?

¹ A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that the Award should be modified as claimant is unable to work and, therefore, entitled to receive permanent total disability benefits.

There is no dispute that on June 20, 2006, the bucket from a Bobcat fell striking claimant's left leg and landing on his foot. The parties stipulated the accident arose out of and in the course of claimant's employment with respondent.

Following the accident, claimant was taken to a local hospital emergency room where he was given crutches, medication, and taken off work for a week. Claimant was also instructed to follow up with a doctor but respondent refused to provide claimant with additional treatment.

On or about June 26, 2006, claimant returned to work for respondent and resumed his regular duties as a laborer installing sewer and water mains. Continuing to work, claimant experienced pain and swelling in his left foot until he could hardly work due to his foot pain.² On July 21, 2006, claimant missed work when he was unable to put his boot on his left foot. On that date, respondent wrote claimant a letter terminating him for excessive absences. Claimant acknowledged that he missed work on June 6, July 12, 17, and 21, 2006. But he also explained that he had missed work after his accident due to the weather and the pain in his foot.³

After claimant obtained legal counsel and filed this claim, respondent referred claimant to Dr. Susan Bonar, who diagnosed CRPS, prescribed a cam boot, and referred claimant to Dr. Mark B. Chaplick for pain management. Dr. Chaplick gave claimant two lumbar sympathetic nerve blocks and referred claimant to Dr. Greg Horton, an orthopedic surgeon, at the KU Medical Center. Dr. Horton injected claimant's left foot, prescribed medications, and referred claimant back to Dr. Chaplick. In late 2007, claimant received a permanent dorsal column stimulator, which was implanted in claimant's lower back for his left lower extremity pain.

On February 22, 2008, Dr. Chaplick determined claimant had reached maximum medical improvement. Nevertheless, Dr. Chaplick continues to see claimant on a monthly basis to monitor his medications, which have included the narcotic oxycodone (for pain),

² P.H. Trans. at 10.

³ *Id.*, at 20.

clonazepam (for pain and spasticity), Amitriptyline (for sleep), and Lidoderm patches (for pain).

Claimant maintains that since his June 2006 accident he has limped, which, in turn, has caused low back pain. Claimant testified, in part:

Q. Have you developed any additional problems in any other part of your body as a result of your limping?

A. My back.

Q. Describe the problems in your back to the judge.

A. Just hurting, hurting pain in my lower back from walking and limping and trying to carry my foot around. I have dizzy spells and fall over a lot. That's why I've got this guy (indicating cane). I use this for my balance actually, but my foot just constantly hurts anyway.⁴

Claimant denied having back problems before the accident.⁵

Claimant testified that he has a burning sensation on the inside of his left leg from his toes to the kneecap and sharp pain in the front part of the leg and in his foot where the bucket struck him. On a scale of 1 to 10, with 10 being the worst, claimant rated the constant pain in his left leg and foot at 6.

Claimant maintains his injury has significantly altered his life. He testified his sleep is limited to three or four hours at a time, his standing is limited to approximately one hour at a time, he is unable to sit for prolonged periods, his walking is limited to 500 feet or so, and he can no longer run, golf, hunt, or camp. Claimant avoids driving and riding in vehicles as the sitting and hitting bumps is problematic. Dr. Chaplick has referred claimant for psychological services but respondent has not provided that treatment.

In April 2008, respondent wrote claimant about returning to work. Claimant's testimony is uncontradicted that he called respondent's owner several times but could not reach him. Claimant also testified he drove to respondent's shop and waited four or five hours for respondent's owner, who never appeared. When claimant spoke with respondent's secretary about the owner's anticipated return, she was unhelpful. In short, the evidence is uncontradicted that respondent's owner avoided claimant.

⁴ R.H. Trans. at 21.

⁵ *Id.*, at 37.

Claimant, who is in his early fifties, has not worked since being fired by respondent in July 2006. Claimant does not believe he retains the ability to work.⁶ Several days before the October 2008 regular hearing, claimant received news his request for Social Security disability benefits had been granted.

Nature and extent of claimant's injury and disability

Three doctors testified about the extent of claimant's injuries. The first, Dr. Mark B. Chaplick, who is an anesthesiologist and specializes in pain management, began treating claimant in October 2006 for complex regional pain syndrome, type 1. The doctor described claimant's left foot, as follows:

[I] essentially couldn't touch his [left] foot without him jumping, having severe pain. Couldn't stand anything touching the skin even lightly. At times there was -- his foot was very pale, blanched, white, like dead looking compared to the other one. Without significant swelling. I diagnosed him with complex regional pain syndrome, type 1.

. . . .

The old nomenclature was RSD, reflex sympathetic dystrophy, and at least ten years ago or so that was changed to different terminology to better reflect what was going on, though I think it makes it more confusing, actually, but complex regional pain syndrome, type 1 versus type 2. Type 2 would be injury to a major nerve trunk and this is more of a soft tissue injury where the patient develops pain out of proportion to their injury and it's very difficult to diagnose, it's difficult to treat. It's often misdiagnosed or undertreated. There's no specific tests where you can actually diagnose it. It can be very subjective. There are also very, some gray areas, it's not always black and white, it may be middle of the road which makes it very confusing.⁷

After trying a lumbar sympathetic nerve block, epidural steroid injection, and different medications, Dr. Chaplick made an orthopedic referral. Dr. Chaplick recommended the dorsal column stimulator that was eventually implanted in claimant's low back in late 2007. The doctor explained that a dorsal column stimulator treats chronic pain with low levels of electrical current at the level of the spinal cord that block pain messages to the brain. The dorsal column stimulator utilizes an epidural lead, which essentially is a plastic-coated wire and which is placed into the epidural space about the midthoracic, mid-spine region using an x-ray camera and threaded towards the brain.

⁶ *Id.*, at 32, 33.

⁷ Chaplick Depo. at 6, 7.

Dr. Chaplick did not attempt to rate claimant's injuries. Nonetheless, the doctor concluded claimant may not be able to return to significant gainful employment. The doctor testified, in part:

Well, at that point in time [April 2008] he was status post spinal cord stimulator implant at least a few months and not a whole lot had changed, continues to have a lot of problems with being able to stand for prolonged period of time, he has to sit, his leg swells. Pain is an issue. I think that with the chronic pain was causing him some depression as well, and with the spinal cord stimulator in place, which is treating his pain, you're limited in how much you can move as far as bending, lifting, twisting. We don't recommend too much of that because the lead will move or change position and we've got to go in surgically and revise the lead to put it back in place where it once was.⁸

. . . .

Knowing how difficult it is for people to find work these days and with his limitations, having a spinal cord stimulator, having a hard time, he has problems with his balance now, can't stand on his feet for very long without having to sit down and elevate his foot, I don't know what kind of a job he could do. Maybe there is something out there, but I don't think he would be a very productive employee.⁹

When asked about specific restrictions, the doctor testified that claimant should not lift much of anything and, due to the dorsal column stimulator, perform no excessive bending, twisting, or reaching. Also, the doctor believes claimant cannot be on his feet for very long without suffering increased pain and swelling, which would then require him to sit down and elevate his foot.

In short, Dr. Chaplick believes claimant is unemployable.¹⁰ The doctor, however, acknowledged that he was not a vocational expert and the question of whether claimant was employable was outside his expertise, with the caveat that there is really not much that claimant can do.¹¹

At the time of his February 2009 deposition, Dr. Chaplick continued to see claimant on a regular basis to monitor and prescribe medications. The doctor testified claimant would probably need medications and pain management for the rest of his life, along with

⁸ *Id.*, at 20.

⁹ *Id.*, at 22.

¹⁰ *Id.*

¹¹ *Id.*, at 32.

maintenance and reprogramming of the dorsal column stimulator and medication management.

Finally, Dr. Chaplick testified that he does not recall claimant complaining about any injury to his body other than his left lower extremity. Indeed, the doctor testified that there was no evidence he knew of that claimant's lumbar spine or lower back had been injured or affected by the June 2006 injury.¹² The doctor confirmed, however, that in the patient questionnaire claimant initially noted he had pain into his lower back.

Claimant's medical expert, Dr. P. Brent Koprivica, examined claimant in late April 2008 and concluded the severe crush injury that he sustained to his left lower extremity resulted in CRPS in the left leg and mechanical back pain. The doctor opined claimant's injuries comprised a whole person impairment for three reasons; namely, (1) from the standpoint of pain, CRPS is a condition involving the whole body, (2) CRPS in the lower extremity impacts the ability to stand and walk and treatment included a spinal cord stimulator being implanted in his spine, and (3) claimant has mechanical back pain from an altered gait attributable to the CRPS.

Dr. Koprivica concluded claimant had a 35 percent whole person impairment for the CRPS and a 5 percent whole person impairment for the low back pain, which combined for a 40 percent whole person impairment. And excluding claimant's back complaints and the potential psychological issues, Dr. Koprivica agreed the situs of claimant's disability was the left lower extremity.¹³ The doctor did not attempt to rate claimant's psychological condition. As the *AMA Guides* publication apparently does not provide specific ratings for CRPS, the doctor utilized a position paper published by the American Academy of Disability Evaluating Physicians to rate the CRPS.

Like Dr. Chaplick, Dr. Koprivica did not believe claimant retained the ability to work and testified, in part:

In looking at his presentation, I thought that there were restrictions that were necessary in his ongoing activity. I felt that it was unrealistic to believe that he could work. He's on chronic narcotics, he's got a spinal cord stimulator, he had to have ad lib ability to change from sitting to standing or walking. Pain was so overwhelming on my exam I really couldn't examine him, so I just thought that the presentation was one that would be a permanent disability presentation. . . . I thought that there were psychological consequences to his situation. I thought he had major depression and warranted treatment, and I would recommend that he see a mental health person to

¹² *Id.*, at 30.

¹³ Koprivica Depo. at 34, 35.

look at his case and look at all the issues of it. There was potential impairment psychologically as he presented. I didn't give a number. . . . [B]ut even if you eliminate the issues of depression, I still believe he's totally disabled.¹⁴

In short, Dr. Koprivica believes claimant is essentially and realistically unemployable.¹⁵ The doctor acknowledges, however, that his conclusion assumes the accuracy of claimant's alleged pain complaints. Reviewing the list prepared by Michael J. Dreiling, claimant's vocational rehabilitation expert, Dr. Koprivica believes claimant is unable to perform at least 95 percent of the tasks he performed in the 15-year period leading up to his June 2006 accident.

Respondent hired Dr. James S. Zarr, who is board-certified in physical medicine and rehabilitation, to evaluate claimant. Ninety-nine percent of his evaluations are done for insurance carriers.¹⁶ Dr. Zarr examined claimant in late February 2008 and diagnosed complex regional pain syndrome of the left foot, ankle, and lower leg. Claimant was hypersensitive to touch from the left knee down through his toes and pain inhibited the dorsiflexion and plantarflexion of the left ankle.

Dr. Zarr determined claimant had a 12 percent impairment to his left lower extremity at the level of the knee, which the doctor indicated was based upon the *AMA Guides*.¹⁷ The doctor did not place any restrictions on claimant. Moreover, the doctor testified that merely implanting a dorsal spine stimulator neither creates a rateable impairment under the *Guides* nor compels work restrictions. The doctor also testified that claimant did not have any back complaints.

Assuming that claimant had a preexisting seven percent whole person functional impairment and that Dr. Koprivica had rated claimant's low back condition as comprising a five percent whole person impairment, Dr. Zarr testified he believed that any low back complaints claimant now has preexisted the June 2006 accident.¹⁸ The doctor testified, in part:

¹⁴ *Id.*, at 23, 24.

¹⁵ *Id.*, at 24, 25.

¹⁶ Zarr Depo. at 16.

¹⁷ Zarr Depo. at 11. The *AMA Guides* refers to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.); all references are based upon the fourth edition of the *Guides* unless otherwise noted.

¹⁸ Zarr Depo. at 12.

Q. And I may have asked this, but I want to make sure the record's clear on this, Doctor. Any impairment that -- in your opinion, within a reasonable degree of medical certainty, any impairment that Mr. Smith *[sic]* would suffer from would be preexisting impairment. Is that your opinion, to the low back? I'm sorry.

A. Yes.

Q. Okay. And when you say "preexisting impairment," you're referring to the impairment that [claimant] suffered from as a result of the impairment provided by Dr. Smith in his November 7th, 1999 report?

A. Yes.

Q. And that was a 7 percent impairment to the low back?

A. Correct.

Q. Or the body as a whole, I should say.

A. Correct.¹⁹

The seven percent rating referred to above was set forth in a November 7, 1999, medical report authored by Dr. J. Michael Smith. That report was entered into evidence at Dr. Zarr's deposition. The Board notes, however, the report does not indicate the impairment rating was based upon the fourth edition of the *AMA Guides*.

Claimant's attorney hired vocational rehabilitation expert Michael J. Dreiling to evaluate claimant. Mr. Dreiling met with claimant in June 2008 and in reviewing claimant's work history found that during the 15 years before the June 2006 accident claimant had worked as an over-the-road truck driver, construction worker, equipment operator, carpenter, and on a lawn crew. Mr. Dreiling also found claimant graduated from high school in 1975 and had no further education or training over the last 30 years.

Considering the medical opinions of Dr. Chaplick and Dr. Koprivica and claimant's vocational factors, Mr. Dreiling concluded claimant was essentially and realistically unemployable.²⁰ Mr. Dreiling opined that claimant was unable to return to his previous work, was not a good candidate for retraining, and did not have transferable job skills in light of his medical condition.

¹⁹ *Id.*, at 14, 15.

²⁰ Dreiling Depo. at 12.

The Board finds the evidence establishes that claimant has developed CRPS in his left lower extremity that is extremely painful. Indeed, claimant receives ongoing medical treatment, which includes narcotic medications. Also, as a direct result of the left lower extremity injury claimant has a dorsal column stimulator, which is implanted in his spine. Due to the lower extremity injury, claimant is unable to stand or walk for any prolonged period as he experiences pain and swelling. Consequently, he must sit and elevate his foot. The Board is also persuaded by Dr. Chaplick's testimony that due to the dorsal column stimulator, claimant has additional work restrictions and limitations that he must observe; namely, no excessive bending or twisting at the waist, and no excessive reaching.

In addition, the Board finds Mr. Dreiling's opinions credible that considering claimant's vocational factors, he is essentially and realistically unemployable.

The Board finds the opinions of Dr. Chaplick, Dr. Koprivica, and Mr. Dreiling that claimant is unable to work and essentially and realistically unemployable are credible and persuasive. Accordingly, the Board concludes claimant is unable to engage in substantial and gainful employment. Accordingly, claimant is entitled to receive permanent total disability benefits under K.S.A. 44-510c, which provides, in part:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*²¹ held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent."

Respondent maintains claimant is precluded from receiving permanent total disability benefits on the basis that the situs of his injury is his left lower extremity. The Board acknowledges the appellate courts have held that in determining whether a particular injury is to be compensated under the schedule of K.S.A. 44-510d or under K.S.A. 44-510e it is the situs of the resulting disability rather than the situs of the trauma or original injury that controls.

²¹ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

It is the situs of the resulting *disability*, not the situs of the trauma, which determines the workers' compensation benefits available in this state.²² (Emphasis added.)

The Board rejects respondent's argument that claimant is precluded from receiving permanent total disability benefits. First, the Board finds the situs of claimant's *disability* includes the low back. The greater weight of the evidence establishes that claimant's medical restrictions include those for his low back due to the placement of the dorsal column stimulator. Claimant is now restricted from excessive bending and twisting at the waist due to that device. Accordingly, claimant's *disability* or ability to perform work is affected by more than the injury in the left lower extremity.

Second, respondent's interpretation of K.S.A. 44-510d is misplaced. As explained above, that statute is not applicable due to the situs of claimant's disability. In addition, the statute is not applicable in this instance as it pertains only to permanent *partial* disabilities. The statute reads, in part:

44-510d. Compensation for certain permanent partial disabilities; schedule.

(a) Where disability, partial in character but permanent in quality, results from the injury

In conclusion, the Board concludes claimant is entitled to receive permanent total disability benefits.

Credit for preexisting impairment

The Workers Compensation Act provides that injured workers are not entitled to recover for the aggravation of a preexisting condition, except to the extent of increased disability. K.S.A. 2005 Supp. 44-501(c) provides:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

And functional impairment is defined by K.S.A. 44-510e(a) as:

the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association

²²*Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984); also see *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510d(a)(23) also requires functional impairment to be determined by that same publication.

Respondent is not entitled to receive any reduction for claimant's alleged preexisting functional impairment as the evidence fails to establish what that impairment in terms of the fourth edition of the AMA *Guides* may have been immediately before the June 20, 2006, accident.

Furthermore, the Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) reduction. In *Mattucci*,²³ the Kansas Court of Appeals stated:

Hobby Lobby erroneously relies on *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both *Baxter* and *Hampton* instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton [sic]* court declared that "settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury." 241 Kan. at 593.

Temporary total disability benefits for July 21 to August 16, 2006

Claimant requests temporary total disability benefits for the period from July 21 to August 16, 2006. That is the period between when claimant was terminated and when the Judge ordered the commencement of his temporary total disability benefits. Dr. Koprivica testified he felt claimant was temporarily and totally disabled from June 20, 2006, until February 20, 2008.²⁴ The Board finds that claimant was fired for missing work. Moreover, the Board finds claimant missed work due to the pain and swelling in his foot. The evidence indicates that during the period in question claimant needed medical treatment. Considering the entire record, the Board finds it is more probably true than not that

²³ *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2000).

²⁴ Koprivica Depo. at 21.

claimant was temporarily and totally disabled from July 21 to August 16, 2006, and, therefore, his request for temporary total disability benefits should be granted.

In conclusion, the Award should be modified to grant claimant permanent total disability benefits.

AWARD

WHEREFORE, the Board modifies the March 13, 2009, Award entered by Judge Yates Roberts.

Phillip L. Stuart, Jr., is granted compensation from Westland Construction, Inc., and its insurance carrier for a June 20, 2006, accident and resulting disability. Based upon an average weekly wage of \$542.91, Mr. Stuart is entitled to receive 84.14 weeks of temporary total disability benefits at \$361.96 per week, or \$30,455.31, plus 261.20 weeks of permanent total disability benefits at \$361.96 per week, or \$94,544.69, for a permanent total disability and a total award not to exceed \$125,000.

As of August 20, 2009, Mr. Stuart is entitled to receive 84.14 weeks of temporary total disability compensation at \$361.96 per week in the sum of \$30,455.31, plus 81.15 weeks of permanent total disability compensation at \$361.96 per week in the sum of \$29,373.05, for a total due and owing of \$59,828.36, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$65,171.64 shall be paid at \$361.96 per week until paid or until further order of the Director.

Claimant is granted ongoing reasonable and necessary medical care and treatment for his June 20, 2006, accident.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the Order of the majority in this matter. Claimant suffered an accidental injury to his left lower extremity for which he should be compensated at 17 percent to the lower leg. However, claimant's impairment has been expanded to include the low back. Claimant complained about his low back to only one of seven doctors who examined or treated him. Dr. Koprivica, the only doctor to whom claimant discussed his low back pain, was not provided a complete history of claimant's past injuries. Dr. Koprivica was not told of claimant's low back injury in 1999 for which claimant was rated at 7 percent to the whole body. Additionally, claimant has not asked for nor received any treatment for his low back since the June 2006 accident occurred. Claimant has failed to prove that he suffered any injury to his low back. This Board Member would find that claimant suffered an injury to his left lower extremity only, and the determination by the ALJ should be affirmed.

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge